(2) in the present case the prosecution had not tried to prove the accuracy of the chart and failure to do so was fatal to the prosecution case.

CRIMINAL APPEAL.

Zulkifli bin Ahmad Makinuddin (Deputy Public Prosecutor) for the appellant.

Parjit Singh for the respondents.

Syed Othman J.: The respondents were charged in the Sessions Court at Johor Bahru with 2 offences under the Customs Act, 1967 in respect of 31,103 pounds of sheet rubber and 9,217 pounds of scrap rubber which were found in their boat, which is stated in the charge to be ¾ mile off Kampong Jawa, Penggarang, Johore: *first charge* under sections 135(1)(e) and punishable under section 135(1)(i) of the Act i.e. knowingly concerned in conveying in the boat the rubber with intent to defraud the Government of export duty of $7,300; *second charge* under section 49(1) and punishable under section 138 of the Act i.e. conveying the goods in local craft without the permission of the Director General of Customs.

They claimed trial. At the conclusion of the prosecution case the learned President Sessions Court acquitted the respondents.

There are several grounds of appeal. But Encik Zulkifli, Deputy Public Prosecutor, attached to the Customs Department, is merely asking one question to be determined as, according to him, it has far reaching implications. The question is whether a chart of the waters of Malaysia made by the British Admiralty is *prima facie* accurate.

The learned President, in his grounds of judgment, agreed with the submission of defence counsel, Encik Parjit Singh, that the respondents had no case to answer, as the prosecution had failed to prove the accuracy of the British Admiralty chart which had been used by the Customs officers to fix the position of the respondents' boat in the sea from Kampong Jawa, Penggarang, in the south coast of Johore.

On June 29, 1977 after hearing the arguments, I dismissed the appeal and indicated that I would give my grounds later.

For the appellant, it was argued that despite the provisions of section 83 of the Evidence Act, the court should have taken judicial notice of the accuracy of the British Admiralty chart by reason of section 57 of the Act, as the chart was made when the British were in authority in this country in 1933, and Customs and Marine officers had been using such chart for many years.

For the respondents, it was argued that it was not disputed that the chart was published under authority of the British Crown, but by reason of section 83 of the Evidence Act, its accuracy must still be proved.

Section 83 of the Evidence Act reads:

"The court shall presume that maps or plans purporting to be made by the authority of the Federal Government or the Government of any State were so made and are accurate."

Section 57 of the Act relates to matters of which the court shall take judicial notice. I do not think it is necessary for me to set it down here, as I find nowhere is it stated in the section that the court shall take judicial notice of the accuracy of maps or plans made under the authority of any of the Governments in this country or foreign Governments. The learned President rightly admitted the chart in evidence, as it was established that it had been used for fixing the position of the boat. But the question of the chart's accuracy is another matter.

Section 83 is clear. The court can only presume the accuracy of maps or plans made by the authority of the Federal or any State Government. The effect is that the presumption does not apply to maps or charts made by other Governments; their accuracy must therefore be proved by the party producing it.

In the present case, the prosecution should have no difficulty in proving the accuracy of the British Admiralty chart. The officer in charge of the Customs boat should have adduced evidence that he had always been using that chart and had found it to be accurate. Failure to do this, to my mind, was fatal to the prosecution case.

In any case, from the record I find that there are other grounds on which the learned President could have acquitted the respondents. I do not have to deal with them, as they have not been argued upon.

Before I leave, I would like to say that it is a well-known fact, as the prosecution itself has stated, that in maritime matters the Governments, Federal and State, mainly rely on maps or charts made by the British Admiralty and other maritime nations. I think the authority concerned should consider amending section 83, so that the presumption applies to any map or chart made by these maritime nations and used by Government departments.

Appeal dismissed.

Solicitors: *Parjit Singh & Co.*

ABDUL RAHMAN BIN CHE NGAH & ORS. v. PUTEH BIN SAMAT

[O.C.J. (Abdul Razak J.) February 10, 1977]
[Kota Bharu — Civil Suit No. 26 of 1973]

Tort — Negligence — Burning of rubbish heap ignited fire on adjacent land — Destruction of rubber trees — Principle of Rylands v. Fletcher applied.

The defendant was a contractor engaged to clear an irrigation canal which went through the plaintiff's rubber land. The work involved clearing bushes, weeds etc. in the stream and on the banks. It was alleged that these dumpings were negligently set on fire by the defendant and the ignition escaped to the defendant's land which caught fire, destroying the rubber trees on it.

Held: (1) there was clear evidence adduced by the plaintiff of negligence on the part of the defendant in not taking care, having started a fire, to control it as not to cause damage;

(2) even if negligence was not proved, the defendant was still liable under *Rylands* v. *Fletcher* for the escape of the fire resulting from an unnatural user of the land.

Cases referred to:-

(1) *Rylands* v. *Fletcher* (1866), L.R. 1 Exch. 265, aff. (1868), L.R. 3 H.L. 330.

(2) *Hazelwood* v. *Webber* (1934-35) 52 C.L.R. 268.
(3) *Lim Pit Seng* v. *Lai Ngion Siew* [1974] 1 M.L.J. 133.

CIVIL SUIT.

Dato Wong Seng Chow for the plaintiff.

S. Sivasubramanian for the defendant.

Abdul Razak J.: This is an action for damages caused to the plaintiff's rubber trees by fire. The action was based on negligence or on *Rylands* v. *Fletcher*[1] or Nuisance. At the outset plaintiff abandoned his course of action based on nuisance.

The statement of claim alleged that the defendant was a contractor engaged to clear an irrigation canal which ran through the plaintiff's rubber land at Sg. Tapong. The work involved clearing bushes, weeds and the like in the stream and on the banks of the canal and to place them on the banks. It was alleged that these dumpings were negligently set on fire by the defendant and the ignition escaped to the plaintiff's land which caught fire, eventually burning the plaintiff's rubber trees. They said the defendant had failed to prevent the escape or failed to device a proper system of control to prevent the escape. The defendant in his defence admitted only that he was engaged as a contractor by the Drainage and Irrigation Department to work at the irrigation canal of Sg. Tapong. He agreed that in the course of clearing the canal, his agent or servants heaped the clearings from the canal on to the bank. He denied his servants negligently set fire to the clearings after placing them on the bank.

The facts as adduced by the plaintiff were as follows. On May 30, 1972 the plaintiff, one Abdul Rahman bin Ngah, one day met Raja Abdullah, PW10 who told him that his rubber estate at Besut on lot 1796 and the land adjoining it had been burnt down. The land adjoining belonged to PW2, PW1's father-in-law. Raja Abdullah told him that the defendant's labourers had caused the fire. He went and found that the estate was burnt down. On the way he met one Mohd. bin Yaacob, PW8 who told him that the defendant's labourers one day went to see him and asked him whose estate it was that was burnt and he replied it belonged to a man from Kota Bharu. PW8 asked the men why they set fire to the estate. They said they were burning the hornets' nests. He then went to Jerteh with Raja Abdullah and met the defendant and told him about the fire. The defendant said his labourers told him some of the estate was burnt. PW1 told him not some but all. The defendant then said he was going to discuss with his labourers. They agreed to meet at Nik Man, the penggawa's house but on the appointed day the defendant did not turn up. He then made a police report. PW2 Harun bin Yaacob confirmed that he was told about the burning on his own land, lot 1795 by PW1, his son-in-law. He went and saw the estate was in ashes except for about an acre. He said the land was planted fully with rubber, about 3 to 4 years' old and an irrigation canal ran through his land which adjoined the plaintiff's land. There was a government reserve of about two to three depas on both sides of the bank. A clearing was done of the canal in April or May 1972 by the defendant's workers. It was a dry season. The workers threw the clearing from the canal made up of bushes and weeds along the bank. He also said that Mohd. bin Yaacob, PW8 told him the workers said they were burning the hornet's nest.

The police, PW3 went to the scene and found 2,360 trees were burnt down. At the scene he found rubber trees and tobacco plants. The banks were strewn with weeds and bushes. The river had also been cleared. He also found a burnt torch made of coconut leaves on the bank about three depas from it. He said less than a quarter of an acre was not burnt. When he went there it was about 19 days after the incident. He said the rubber trees were about 10 feet from the canal. The J.K.R., PW4 confirmed that the defendant was given a contract to clear the canal at Sg. Tapong. He was required to do the work according to the conditions and specifications laid down in P2. The J.K.R. was only concerned with the production of work, not supervision. The J.K.R. had no control over the workers. The contractor was to clear 10 feet from the river. Then he had to burn the clearing after it was dry.

Mohd. bin Yaacob, PW7, a tobacco planter, said he grew tobacco at Sg. Tapong bordering PW2's land. On the day of the incident he saw workers clearing the canal. They were defendant's workers. It was about 10 a.m. He knew the defendant by name. He saw them lighting fire but he did not know why they were doing so. There was smoke. He asked them why they were lighting fire. They did not reply. He then went home which was about 200 depas from the tobacco land. Later he heard people shouting from the direction of PW2's land. There was smoke and fire. It was burning the whole day and for three days. After the fire died down, three persons came to see him and asked whose estate it was. He said they belonged to someone from Kota Bharu. He said he had seen these workers of the defendant working in the stream before.

Mohamed Yaacob bin Saman PW8 also of Sg. Tapong said on the day of the incident he saw three persons clearing the stream close to the land of PW1. He was watering his tobacco plants then. He saw them lighting fire by the side of the stream. He shouted to them why they were lighting fire since it might burn the rubber land. There was no reply from them. The fire lasted for one day but the ambers died down only after three days. He had seen the workers before, often clearing the stream. He told PW1 about the incident.

PW9, also living at the place of incident, saw smoke on that day and informed Raja Abdullah PW10, the Penghulu, that PW1's rubber was burnt.

Raja Abdullah PW10 said he came to know about the incident from PW8 and he went to see. When he arrived there at about 2.00 p.m. the fire was still burning. He then informed PW1; then he and PW1 went to see Puteh, the defendant because PW1 wanted to see him. According to PW10, PW1 asked the defendant about the burning of his estate and the defendant replied that his workers had lighted the fire.

PW1 asked defendant what was to be done to settle the matter. The defendant replied he wanted to negotiate. PW5, the RISDA Officer, said that the cost of a rubber tree at 3 years was $28 per year. This included clearing the jungle, making a hole for planting the seed, pruning and burning, the cost of seed (budded seed at $41 per acre and the ordinary seed at $6 per acre) and the cost of maintenance, which includes clearing the lallang.

The licenced valuer, PW6 testified to the value of the land. He inspected the land and found lots 1795 and 1796 burnt down. The total area was about 15 acres, of which 13 acres were burnt. He valued the loss at about $35,000. He went to the scene two years after the incident. He produced a report and in his report he estimated the value of the rubber trees at $15 a tree at 5 years.

The defendant in evidence denied that he and his men had anything to do with the fire, although he admitted he had a contract to clear Sg. Tapong with the D.I.D. The stretch of the canal to be cleared was about 2 miles. He was to clear from the mouth to the source. He was given a specification. He had to clear 10 feet of government reserve on both sides of the bank. The bushes and trees cleared were to be put by the side of the bank along the canal and to let them rot. He was not required to do anything else. He started work on May 5, 1972. He employed four workers whom he called as his witnesses. He said he gave the work to them on "borong" basis; in other words, on a sub-contract. The workers asked for $500 for the "borong". He said on May 22, 1972, two of his workers, Wan Su, DW4 and the other Abdul Latiff, DW3 came to see him. He gave them $100. They told him they wanted to go to work. He then went to Kuala Lumpur. On May 30, 1972 he went to Jerteh. There he met the Penghulu, PW10, PW1 and PW2. He was informed about the fire by them. He told him he would talk to his workers first. He met his workers. They told him they did not know anything about the fire. His workers on May 22 had not yet worked as far as the place of incident. He went to the scene. He saw the trees burnt were tappable. He said the D.I.D. knew about the fire. He denied knowing about the allegation of his workers burning hornets' nests. The workers were not obliged to burn anything for any purpose.

In my view there was clear evidence adduced by the plaintiff of negligence on the part of the defendant in not taking care, having started a fire to control it as not to cause damage. PW7 and 8 who lived at the place of incident gave a consistent and clear account of what they saw on the fatal day. Whatever else that may have faulted in saying or did not say they seemed to maintain that they saw the defendant's workers on the bank clearing the canal and lighting fire to the bush on the day of the incident. They had seen these people before the incident clearing the canal. They said they were Puteh's workers; one of the plaintiffs said he knew Puteh by name. And to corroborate this fact the circumstances unequivocably showed that there could not possibly be any other people working at the place of the incident at the relevant time because the defendant himself said he was given the contract to clear the stream on May 5, 1972 and the engineer said the work did not finish until September 18, 1972. The incident was on May 22, 1972. Neither the defendant nor anyone else had suggested that others had been working during the intervening period. To add to that PW10 had said the defendant admitted that his workers had lighted the fire. A burnt torch was found on the bushes on the bank. It was a dry season. The bushes were along the bank. According to the police the rubber trees were only about 10 feet from the stream. The engineer said the clearings had to be placed not more than 10 feet, from the bank. The police confirmed the banks and the rubber trees were burnt. The D.I.D.'s requirement was that the defendant was to burn the weeds. What other inference can be drawn from these accumulated facts than that the defendants workers taking the opportunity of the dry and hot climate, had burnt the bushes as they were required to do, and because of the nearness of the bushes to the rubber trees the fire spread and the latter caught fire. Or else while they were burning the hornets' nests the bushes and the rubber trees caught fire in consequence. The evidence showed that fire burnt for the whole day till the 3rd day, clearly showing that no one prevented or tried to prevent the fire from spreading. There has manifestedly been an utter lack of care on the defendant's part to prevent damage ensuing.

In the alternative, even if negligence was not proved, in my view the defendant was still liable under *Rylands* v. *Fletcher*[1] for the escape of the fire resulting from an unnatural user of the land. Lindsell on Tort 13th Edition page 860 says "Fire is a dangerous thing and consequently the principle of Rylands and Fletcher applies to it. Accordingly, if a man burnt weeds on his land and the fire spread to the adjoining land he was held liable". The principle is one of strict liability without proof of negligence. Thus it was held in *Hazelwood* v. *Webber*[2] that the burning of stubble in the open in mid-summer is not a natural or ordinary user of the land. In that case the appellant lit a fire for the purpose of burning off stubble. The stubble was burnt off as an ordinary farming operation and in the way in which the majority of farmers in the district burnt their stubble. During the operation a tree stump became ignited and smouldered for five days when a high wind caused the fire from the stump to spread to and damage the respondent's building on his land. The appellant was held liable. In the case of *Lim Pit Seng* v. *Lai Ngion Siew*[3] Suffian C.J. as he then was, held that the defendant was negligent in burning rubber trees for replanting on a land neighbouring the plaintiff's land resulting in the fire spreading and burning the plaintiff's rubber trees. The rule of *Rylands and Fletcher*[1] was not raised; quite clearly I suppose because the burning of cut-down rubber trees for the purpose of replanting on one's own land was assumed to be a natural user of land. In my humble view, the situation here must be distinguished because the defendant was not burning the rubber trees on his land but weeds and bushes on land adjoining a rubber land. Nor do I think the fact that the defendant was asked to burn by the D.I.D. which the latter was legitimately

asking, made a non-natural user into one which was not. The non-natural use of land does not by itself constitute ground of action. It merely imposes on the person who is responsible for it a more stringent duty of care to see that the fire does not escape lest he should be held responsible regardless of care if it escapes. The defendant was not the owner of the land but he was in occupation on an implied licence from the government to work on the land and therefore in possession of the land and thus was in effective control of the land for the purpose of grounding an action against him.

The defendant had merely denied that his servants had caused the fire or alternatively that they had done so against his expressed prohibition.

The plaintiff had given a reasonably probable story of the incident. It was said that the plaintiff's case had not been proven because he had made a distinct departure from the pleading by saying therein that the defendant had negligently burnt the clearing whereas in evidence PW1 and PW2 said the cause of the fire was because the defendant's workers were burning the hornets' nests. A distinction must be made as counsel, I have no doubt was well aware, between an assertion of fact in the pleading and the evidence which was necessary to prove to establish the fact. To say that the clearing was negligently set on fire was merely an assertion of fact; how it was alleged to be negligently set on fire was a matter of evidence. The plaintiff would not know how the fire was caused. They heard it from others. When they said it was caused by the hornets' nests they must in their honest belief merely have believed so but others PW7 and 8 said they were caused by the workers setting fire by the side of the stream. There were thus two possible inferences of negligence. That either the workers were burning the hornets' nests in the course of which the bushes and rubber trees caught fire or else they were burning the bushes and the rubber trees caught fire. In either case they must have failed to exercise care to prevent the fire from spreading. Be that as it may, I do not think that it would matter whether the fire was due to the burning of the hornets' nests or to the burning of the bushes because according to PW7 and 8 the fire was started by the defendant's workers on Government's reserve and they had shown nothing to indicate that they took steps to prevent it from spreading to the plaintiff's land. The defendant's demeanour was not consistent with one who claimed he had no knowledge of the fire or was not responsible for it. He was asked why he did not instruct the workers to burn when the specification P2 required him to do so? He said he would do so only after getting the J.K.R.'s permission. When asked what he did to get the J.K.R.'s permission he said he brought the J.K.R.'s supervisor to the site. He was then asked why he needed to bring the supervisor to the site if the work was on a sub-contract and he was not concerned with how the work was done. Then he admitted he did not take the supervisor to the site. He said the work was given on "borong" to the workers for $500. This was apparently a clear lie because the workers said the work was never on "borong" basis but on a daily basis. In any event this defence was never pleaded and could not be raised. Far from saying that he did not authorise the burning the plaintiff's conduct was consistent with one who was fully aware of the mishap because one recalled when the Penghulu and the plaintiff asked him what he was going to do about the fire, the defendant said he would negotiate. One would have expected him to say that the allegation was a blatant lie.

The defendant was liable for the work of his employees being done in the course of their employment. On balance I find that the defendant had caused the damage to the plaintiff's rubber trees.

As regards damages, RISDA, PW5 said a tree at 3 years would cost $28. Against that the valuer, PW6 said at 5 years the cost was $15 per tree. The police PW3 said the number of trees damaged were 2,360. The valuer on the other hand said it was 2,340. I am inclined to think the police would be more correct having been to the scene before the valuer which was 2 years after the incident. I would say, therefore, bearing in mind the evidence of RISDA and the valuer that at 3 years the cost per tree is approximately $10. Taking 2,360 trees as having been burnt the cost of the trees would be $23,600. I would award damages to the plaintiff therefore in the sum of $23,600 and costs to be taxed with liberty to them to apply to the S.A.R. for distribution, if any.

Order accordingly.

Solicitors: *Dato Wong Seng Chow; S. Sivasubramanian.*